

Developments in intellectual property and traditional knowledge protection¹

Jane Anderson
Visiting Scholar, School of Law
New York University

In order to protect indigenous/traditional knowledge, intellectual property law must be leveraged in a way that is responsive to the dynamic inter-relationships between law, society and culture. Over the last decade, increased attention to Indigenous concerns has produced a wealth of literature and prompted recognition of the diverse needs of Indigenous peoples in relation to law, legal access and knowledge protection. There is much more that needs to be done, especially in closely considering what the consequences of legal protection are for the ways in which traditional/indigenous culture is understood and experienced by Indigenous communities and others. This paper considers the latest developments within this field and discusses what possibilities for further legal action exist within both international and local contexts.

¹ The text of this paper was delivered at the 60th Annual Conference for NGO/ Director of Public Information United Nations, New York, 6 September 2007. This paper is reconstructed from speaking notes. It has references where possible. Any mistakes or oversights are my responsibility. My sincere thanks to Ulia Gosart and LIENIP.

Introduction

This paper derives from research I have been conducting for the last six years in the field of intellectual property (IP) and indigenous/ traditional knowledge protection. In general, my work focuses on the social impacts of law. This approach considers the consequences of legal protection for the ways in which traditional/indigenous culture is understood and experienced by Indigenous communities and others. It acknowledges that framing Indigenous and/or traditional cultural practices as IP may have unintended effects on the very processes of transmission and reproduction that communities need to maintain. Correspondingly, it recognises that there are circumstances where IP can advance and secure ownership in traditional communities that are facing external threats in the use of community-specific knowledges.

This work has been both theoretical and practical in scope. In particular, I have worked with numerous Indigenous artists, cultural practitioners and communities in Australia and Indonesia. This work has involved long periods of talking with artists and community leaders about what problems are facing their traditions and cultural practices, where the greatest threats are coming from, and what specific ideas they have for strengthening both community control over traditional knowledge and ensuring the future for traditional practices.

Practically, my work has focused on moving beyond the abstracted characterisations of problems that appear only to be remedied by developing more intellectual property protections. For example, there are often a range of inter-connected issues that make the 'problem' in the first place, and most often law cannot, or indeed, may be inappropriate, to address these additional issues. In this sense my work has been about broadening both the legal and non-legal possibilities for managing the social relationships around knowledge access and use in changing cultural contexts.

In this paper, I want to discuss some of the recent work on IP and traditional knowledge conducted in Australia and Indonesia. Recent developments in this area within Indonesia and Australia suggest that a more contextualised and localised approach to IP and traditional knowledge issues can deliver outcomes and planning strategies that are meaningful and useful for local people and local communities seeking to secure their knowledge and knowledge practices.

The story so far

As many would be aware, the discussion of IP protection has increased steadily over the last 30 years. There are many reasons for this. One key reason relates to the united voice that Indigenous people have been able to build within the international system. Indigenous participation in forums such as the Convention on Biological Diversity, the World Intellectual Property Organisation and the Permanent Forum on Indigenous Issues makes visible Indigenous concerns. Indigenous perspectives can no longer be ignored or sidelined.

National governments are also taking the issue seriously. For instance, Indonesia is in the process of developing three new pieces of legislation specifically designed to protect traditional knowledge. Whilst there are a few concerns that need closer attention within these new legislative developments, Indonesia is also influencing other countries within South-East Asia to make the issue more of a priority.

Indigenous interests in intellectual property are valid and important, yet crucial questions remain as to how we are to develop workable strategies that Indigenous people are actually able to access and activate. It is not enough that discussion occurs in international organisations or within national governments or bureaucracies. It is important that Indigenous people are provided with the advice and

the tools to choose how to control and protect cultural resources and traditional practices.

Of course, there are vast differences within and between Indigenous communities. Not every Indigenous community is the same or is faced with exactly the same problem. This means that solutions need to be flexible, and have the capacity to change over time as the community and the issues will also change.

There is also another fundamental point here – traditional knowledge and traditional cultural practices can only survive when the communities themselves are supported. There is no use protecting art or traditional knowledge unless the community from which that knowledge derives is also provided with support to develop into the future as that community chooses.

Unfortunately this is not the job of IP alone. This means that IP needs to be used strategically. There needs to also be concerted attention given to the development of other potential non-legal solutions that might also be useful in advancing Indigenous interests.

Intellectual property is a specific cultural tool that favours western individualistic modes of expression and art. This is its history and it will be very hard to disrupt its current social, cultural and economic trajectory (this is especially the case after IP became heavily tied to trade through the 1994 Agreement on the Trade Related Aspects of Intellectual Property – TRIPS).

That said, the power of IP is that it permeates so many parts of our social worlds, and this is what makes it useful and possible to harness strategically. But we need to remember that IP is not a panacea. There are too many examples of this body of law reducing cultural practices and freezing them in time so that no-one, not even members of the community, can put those cultural practices to use. IP has significant

dangers associated with it and I will give an example of that a little later in relation to plans to patent batik in Indonesia.

My approach – and this comes from talking with hundreds of artists and community leaders – is to develop strategies that address specific concerns, to utilise already existing laws and legislation, and to provide better access to law and legal advice to Indigenous communities. If there is a role for IP in supporting Indigenous people's cultural practices, it is to enhance and encourage the very conditions in which the everyday processes through which those arts have flourished in the past, and continue to exist today, can be maintained and strengthened.

In short, we need to become creative with intellectual property law.

What the problems are

So now I want to outline briefly some of the concerns that traditional knowledge holders in Indonesia have raised to a team of researchers, of which I was a member.² Then I will briefly discuss some of the strategies that have been developed or are in the process of being developed to deal with some of these problems.

Before I begin, it is worth remembering that these concerns, which were specific to artists and traditional knowledge holders across the Indonesian archipelago, also have parallels with issues that have been raised in Australia. A key point remains that while international

dialogue around these issues is an important pre-cursor to developing solutions, they can only be enhanced by discussions with artists, traditional knowledge holders and community leaders themselves.

Importantly, many concerns expressed by artists and community leaders were about the life of the traditional knowledges and arts and how they might be passed on. The concern was not just about outsiders coming and 'stealing' or 'taking' the cultural knowledge but significantly about how this knowledge will be successfully transmitted within the community into the future. In general, it was clear that as the problems were explained they mirrored a more fundamental anxiety: namely, that the traditional arts and traditional knowledges are a living, embedded part of everyday existence, drawing meaning from and infusing meaning into social life. The individuals with whom we spoke were centrally concerned about the survival of the social institutions and practices in which the knowledge, knowledge practices and arts are based, maintained and transmitted within and between communities.

Generally, the concerns can be summarised in the following way, and here I draw directly from the research report.

In the context of traditional arts and cultural practices, the most frequent concern identified by Indonesian traditional artists and community leaders was the problem of audience; specifically, how to maintain and increase the number of people who are interested in seeing, hearing or using the work that artists produce. The problem of audience has several more components, the most immediate of which relates to local interest in the traditional arts. Artists repeatedly expressed anxiety that their practices were at risk of becoming detached from the day-to-day social life of the community. Thus, weavers who have successfully maintained or even revived old textile arts traditions told the research team that fewer and fewer local people actually wore these locally produced cloths, either because of shifts in taste or for straightforward economic reasons. Likewise,

² This research project was conducted between 2005 and 2007 with funding from the Social Science Research Council, Ford Foundation and American University. The research report upon which this brief summary draws is: Jaszi, P. (ed.), *Traditional arts: A move toward protection in Indonesia*, 2007. Members of the research team and authors of the research report included: Jane Anderson (New York University), Lorraine Aragon (University of North Carolina), Ignatius Haryanto (Lembaga Studi Pers dan Pembangunan), Peter Jaszi (American University), Abdon Nababan (Aliansi Masyarakat Adat Nusantara), Hince Panjaitan (Indonesia Law and Policy Centre), Agus Sardjono (University of Indonesia), Rizaldi Siagian (Yayasan Karya Cipta Indonesia) and Ranggalawe Suryasadin (University of Indonesia).

musicians reported that they were now in less demand for local ceremonial and social occasions. On occasions when, in the past, a full traditional ensemble would have been expected to perform, recorded music or a small ensemble playing electronic instruments might be employed instead. This decrease in community support for the cultural arts was disturbing to many of the artists and the community leaders. This lack of support and the need to find new ways to invigorate the traditions so that they were part of the broader community fabric were immediately raised with the research team.

The struggle to maintain inter-generational transfer of knowledge was the issue next most commonly identified by the artists and community leaders with whom we spoke. Regular recruitment of new artists, musicians and performers is a necessary precondition for the continued health of Indonesian traditional arts and traditional knowledge. Concern was raised about how this was possible if there was no economic value associated with the arts. For instance, children were not being encouraged to become community artists because there was little financial gain, and the family required the younger members of the family to contribute to the family's subsistence in very specific financial ways. These communities were generally disenfranchised and impoverished – people tended to work in very difficult conditions, with little pay and for long hours. This economic reality was affecting the extent to which the next generation could become responsible for learning and mastering the traditional artistic practices. This was of great concern to community leaders.

This concern about commensurate economic reward for maintaining community traditions was paralleled by concerns about the lack of appropriate recognition for the artists and for their local traditions and products derived from these. This issue was so substantial that it surfaced, in some way, in practically every conversation that the research team had with traditional artists and community leaders. Many arts communities believe that their particular local practices

and products receive insufficient recognition. Further, many of the artists were concerned that when local traditional artistic productions entered the national or international market, little or no credit is given to the community in which these traditions have been maintained, nor is any information provided about the stories that lie behind the material. This meant that there was little reverse flow in terms of recognition, attribution or even economic reward. This loss of acknowledgement was a real problem as it meant the local artists became featureless, and indistinguishable, even sometimes within their own or neighbouring community. This disrupted hierarchies of authority and the sense of pride that communities have because of their distinctiveness from others. As a response to this we encountered a number of traditional communities, especially cooperatives of traditional weavers, who were experimenting with various kinds of 'branding' to identify their hand-made productions in the local, regional and national markets.

Many artists also saw issues around the type of acknowledgement provided when local visual motifs or musical figures were used as source material for mass-produced decorative products or new works of popular culture. If any acknowledgement was given, it tended to be general and uninformative, such as 'traditional design' or 'traditional song'. Here the desire is for specific acknowledgement, both because the artists reasonably believe that the acknowledgement is legitimate for themselves and the communities, and because they believe that in making more people aware of the living sources of Indonesian traditional knowledge and arts, acknowledgement may work, sometimes indirectly, to the benefit of the communities.

Additional concerns about counterfeiting were also raised. Weavers, for example, were concerned that reasonable copies of cloths that require weeks or months of their time might be produced in hours in factories using semi-mechanised looms. These same cloths then were available at reduced prices. This was seen as unfair competition that

discriminated against traditional methods, materials and techniques. The concern, incidentally, was most frequently articulated in terms of 'knock-offs' that might potentially be made and sold within Indonesia itself.

Many artists, musicians and dancers also raised the problems of misappropriation of works by unauthorised recordings, reproduction and/or distribution. Many of these artists were concerned that the new technologies which make high-quality audio and video recording easy, inexpensive and inconspicuous would lead to an increase in cases where individuals who attend traditional performances were able to make good quality recordings and later commercialise them for their own benefit. There were many examples of these available for sale in markets in Jakarta, hundreds of kilometres away from the source community and with no attribution.

These were some of the issues that local traditional and indigenous communities remain concerned about in relation to their knowledge and artistic practices.

Some solutions that utilise legal and non-legal approaches

Protocols, which work as agreements on appropriate uses of works, seek to embolden community capacity to respond to infringements and to encourage the development of new contexts where knowledge and arts can be shared within communities and with external parties. Protocols are actually about setting codes of conduct or establishing behavioural norms. If we recognise that legislation alone cannot solve all these problems, then we need to consider what other options could be developed that are useful, easy to utilise and effective.

While Australia has developed a range of strategies, one of the most useful is the development of protocols, agreements and, more recently, community-based protocols. The utility here is that they can be changed and augmented over time as the issues within the

community change. This is not something that is easy to do within a legislative regime. Indigenous communities need law, but they also require flexible strategies that can therefore avoid the 'one size fits all' paradigm of law and legal intervention.

Another strategy that was utilised in Australia with moderate success was the development of Labels of Authenticity, which functioned as labels of origination, designating where the work was made and by whom. These can function in similar ways to trademarks. While the problem of registration persists, especially for communities who have trouble accessing legal advice, there are other forms of branding in use. These are being adopted in Indonesia and Australia. In short, these aim to address the problem of attribution mentioned above, as they recognise the community, family and/or clan responsible for the artistic or cultural product.

I want to finish with a story from Indonesia about patenting batik in order to illustrate why we must be careful about advocating that IP alone can solve some of these problems.

In Indonesia, the batik community mostly resides in Java in a town called Solo. There are numerous batik producers – some still practise the batik in the traditional way, and some prefer the quicker, more mechanised process. Most batik artists consider their art to be a traditional art form, and this is also how the Indonesian government views the artistic practice. Motifs that are used in batik contain stories and histories. Many also contain family designs that have been passed down from generation to generation and adapted along the way to suit changing markets. In order to protect the traditional batik designs from misuse and misappropriation, local government in Solo has decided to develop a program for patenting the traditional designs. This means that thousands of batik motifs need to be registered and permission will be required for their use.

As an abstract strategy, this seems like a good idea. Indeed, an Indonesian representative at the United National Development Program has praised the efforts of the Solo government. However, there is a catch and it is significant. To register the traditional designs, there is a fee charged. Ownership of the traditional design is then assigned to the company or family of producers who have registered the motif – that is, the ones who can afford it. Many of the smaller producers cannot afford this initial fee, or the accompanying fee for using the registered design. These smaller producers are usually the families or communities who employ the traditional process and designs. But with this registration process, they are being further marginalised from the industry that enables their livelihood.

The point is that IP can be a double-edged sword. It can enable at the same time as it can restrict. IP creates hierarchies and privilege. It is also about fostering exclusions and monopolies. It can be very useful. It can be completely inappropriate. Accessing as much information as possible is the only way a community can make an informed decision about what the appropriate course of action is or could be.

In summary, then, there are two final points to be made.

Firstly, there needs to be much more sustained and active engagement with Indigenous people and communities about what the problems are. This will help in finding solutions that are appropriate to the problems that are experienced and presented. There is no longer time to work in abstract universalisms, generalisations or binaries – there is too much at stake.

Secondly, we need to become imaginative and creative with how IP as well as other strategies can be utilised. Only by extending ourselves beyond what seems self-evident and normative can real possibilities for protecting and enhancing indigenous rights and interests in protecting knowledge – and thus enabling it to be transferred to future generations – be achieved.

About the author

Jane Anderson is currently a Visiting Scholar in the Institute of Law and Society, School of Law, at New York University, and is also an Expert Consultant with the World Intellectual Property Organisation in Geneva, Switzerland. She holds a PhD in Law (Intellectual Property) from the University of New South Wales. Her thesis is in press as *Law, knowledge, culture: The production of indigenous knowledge in intellectual property law* (Cheltenham, UK: Edward Elgar, 2009).

Contact details

*Institute for Law and Society, New York University,
40 Vanderbilt Hall, New York, NY 10012
Tel: 917-664-6490
Email: ipandtk@gmail.com or ja77@nyu.edu*